IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

No. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL., *Petitioners*

v.

SIERRA CLUB, INC., ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF

For American Public Power Association, Colorado Rural Electric Association, Mid-West Electric Consumers Association, Inc., Montana Associated Utilities, National Rural Electric Cooperative Association, Nebraska Rural Electric Association, North Dakota Association of Rural Electric Cooperatives, Northwest Public Power Association, South Dakota Rural Electric Association, Washington Rural Electric Cooperative Association and Wyoming State Rural Electric Association,

AS AMICI CURIAE IN SUPPORT OF REVERSAL

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INDEX

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AS AMICI CURIAE IN SUPPORT OF REVERSAL [1]

This brief is submitted by the *amici* listed above as *amici curiae* in support of Petitioners' claim that the

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[1] The *Amici* are referred to hereafter as follows: AMERICAN PUBLIC POWER ASSOCIATION—"APPA"; COLORADO RURAL ELECTRIC ASSOCIATION—"COLORADO"; MID-WEST ELECTRIC CONSUMERS

judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club* v. *Morton, et al.*, 514 F.2d 856 (D.C. Cir. 1975) should be reversed. All parties to the action have given their written consent to the filing of this brief pursuant to Rule 42(2) of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

I. DESCRIPTION AND INTEREST OF AMICI CURIAE

American Public Power Association is the national association of more than 1400 local, publicly-owned electric utilities in 48 states, Guam, Virgin Islands, American Samoa and Puerto Rico. A number of these electric systems are large, but most are small cities, towns and villages. A large number, particularly in the Western states, are dependent upon the production of coal in the Northern Great Plains and future planning depends upon the availability of such coal. A sizeable number operate their own generating units requiring that coal. Many others purchase power at wholesale from suppliers which are dependent upon the availability of such coal.

Illustrative of the crippling problems faced by the APPA members dependent upon Western coal are the following three instances:

Muscatine Power & Water, the agency of the city of Muscatine, Iowa which operates the municipal electric

ASSOCIATION, INC.—"MID-WEST"; MONTANA ASSOCIATED UTILITIES—"MONTANA"; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION—"NRECA"; NEBRASKA RURAL ELECTRIC ASSOCIATION—"NEBRASKA"; NORTH DAKOTA ASSOCIATION OF RURAL ELECTRIC COOPERATIVES—"NORTH DAKOTA"; NORTHWEST PUBLIC POWER ASSOCIATION—"NORTHWEST"; SOUTH DAKOTA RURAL ELECTRIC ASSOCIATION—"SOUTH DAKOTA"; WASHINGTON RURAL ELECTRIC COOPERATIVE ASSOCIATION—"WASHINGTON"; AND WYOMING STATE RURAL ELECTRIC ASSOCIATION—"WYOMING".

system, is planning the installation of a new fossil-fired generating unit to be in commercial operation January 1, 1982. It has surveyed the major coal suppliers to determine the cost and availability of low sulphur coal in the quantities required to operate the new plant. It has encountered the same problem time and time again. The coal suppliers have indicated that the uncertainty of the outcome of *Sierra Club* v. *Morton* prevented them from seriously discussing or making any commitments with respect to low sulphur coal from their strip mining operations in the Western states.

The Board of Public Utilities of Kansas City, Kansas, is now purchasing approximately 150,000 tons of coal from Wyoming annually. It operates approximately 480 megawatts of installed generation. Its present generation is dual-fueled. Because of its inability to obtain natural gas, coal has become much more important to it as a fuel source. It is estimated that its need for western coal will increase to 850,000 tons annually by 1979 when its new 235 megawatt coal-fired Nearman Creek Power Station is scheduled to be put in service. It has been unable to obtain contracts to date that will insure the coal necessary to satisfy its requirements. It would appear certain that the required coal cannot become available by 1979 unless the lower court's opinion is overturned.

Another member of APPA which would be severely injured if *Sierra Club* v. *Morton* were permitted to stand is Nebraska Public Power District which has one of the largest electric systems of any of the APPA members. It furnishes electric service at retail to 260 municipalities and communities and supplies at wholesale the total requirements of 74 municipalities, public power districts and rural electric cooperatives. In the

aggregate these customers account for approximately one-half of the electrical power load of the State of Nebraska. Also 20 municipal electric systems with generating facilities of their own have interconnection agreements with Nebraska Public Power District pursuant to which they may purchase part of their requirements from the District.

The District now has under construction a 650 MW coal burning power plant. The estimated construction cost of the plant is approximately $288 million and it has already obligated approximately $206 million in contracts and commitments for engineering, equipment and construction of the project and has already expended approximately $113 million. Commercial operation of the plant was originally scheduled for mid-1977 but because of environmental delays is now planned for mid-1978.

The District plans to use low sulphur coal to minimize the environmental impact at the generating station and has entered into a coal supply agreement with Atlantic Richfield Company to purchase low sulphur coal for the new station from Atlantic Richfield's planned coal mining operation in Campbell County, Wyoming. The injunction which has been stayed by this Court stopped the construction and development of the Atlantic Richfield mine.

Any delay in the operation of the new station as a result of an affirmance of the lower court's opinion will result in unnecessary expense to the District and its rate payers. This expense, while difficult to estimate with any degree of accuracy, would be enormous. If the District does not obtain the low sulphur coal from Campbell County, Wyoming, there is a substantial risk

that its customers would be subject to electric power curtailments resulting in brown-outs and black-outs.

The staying of the lower court's injunction by this Court on January 12, 1976, has resulted in marked improvement in the immediate situation facing the District. Following the issuance of the stay, the Interior Department issued a federal mining permit to Atlantic Richfield Company. Another favorable development following the stay of the injunction was the granting by the Interstate Commerce Commission to Burlington Northern Railroad and Chicago & North Western Railroad certificates to build the rail line between Gillette and Douglas, Wyoming. This line will serve the Atlantic Richfield mine and make possible the delivery of Atlantic Richfield coal to the District.

The District has also observed in the last few weeks that coal suppliers who were, while the injunction was in effect, unable to negotiate coal supply arrangements with it, are now willing to discuss proposals and plans. The District is most encouraged, but realizes that if the Court of Appeals decision were to be affirmed, it again will be faced with the possibility of being unable to supply the electric requirements of 334 municipalities, public power districts and rural electric cooperatives.

Mid-West Electric Consumers Association, Inc., with headquarters at Denver, Colorado, is the regional service organization of the rural electric cooperatives and publicly-owned electric systems located in the nine states comprising the Missouri Basin: Colorado, Iowa, Kansas, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wyoming. Mid-West is composed

of approximately 250 systems, which serve almost 1,500,000 consumers. It was formed to obtain an adequate supply of low-cost and dependable electric power for these groups, and generally to promote the interests of electric consumers in the region.

A number of the members of Mid-West are located in or close by the Northern Great Plains. A very large percentage of the other members will also soon be dependent upon coal produced in that area. Until several years ago these members were able to purchase their power and energy requirements from the Bureau of Reclamation since they are preference customers under the Flood Control Act of 1944, which governs the sale of Missouri River power The power sold by the Bureau to those members is generated at the government-owned dams located on the main stem of the Missouri River.

For the past few years it has been impossible for most of the members who are Bureau customers to obtain all of their requirements from that source because all of the available power has been placed under contract. In order to obtain an additional source at a reasonably low cost, the members banded together to organize generating and transmitting organizations. Examples of such organizations are Basin Electric Power Cooperative, Missouri Basin Municipal Power Agency, Tri-State Generation and Transmission Association and Wyoming Municipal Electric Joint Power Board. These organizations have joined with Western Fuels Association, Inc., and others in submitting a brief *amicus curiae* in this case. That brief explains the development of the Laramie River Project, in which the four organizations mentioned immediately above are participants. That brief also explains the injury which will result to the participants in the Laramie River Project if the coal from the Northern Great Plains Area is not made available for use in the Laramie River Project by the time it is ready to go into commercial operation. Almost all of Mid-West's members will suffer serious injury if that project is not able to operate immediately upon completion because of lack of coal. It is highly probable that brown-outs and black-outs would result. Rationing of power would be a distinct possibility.

Other members of Mid-West purchase power from suppliers who are dependent upon coal purchased in the Northern Great Plains.

It must be emhasized that not only do Mid-West members operate on a strictly nonprofit basis but they are owned and controlled by their consumers. Mid-West wishes to raise its voice in support of the interest of those consumers. They are the one who will suffer if the opinion of the Court of Appeals were to be affirmed.

Colorado, Montana, Nebraska, North Dakota, South Dakota, Washington and Wyoming are state-wide organizations, the members of which are borrowers from the Rural Electrification Administration. Each of them operates at the state-wide level in the same fashion as Mid-West does on a regional level. The members of each are deeply concerned about the possibility of brown-outs and black-outs resulting from the lower court injunction. Their worry is that in addition to the threat of blackouts and brownouts the cost of electricity to their ultimate consumer members will be greatly increased if the opinion below is not set aside. Most of their members are also dependent upon Basin Electric Power Cooperative and the Laramie

River Project for all of their power requirements in excess of those which can be made available by the Bureau of Reclamation.

National Rural Electric Cooperative Association is the trade association of the rural electric cooperatives which have been chiefly financed by the Rural Electrification Administration, an agency of the United States. It has almost one thousand members located in 46 states serving approximately 25,000,000 ultimate consumers in rural areas. Approximately 180 of such members are located in Wyoming or adjoining states. Many of the members, located both within and without such states, operate coal-fueled generating plants which plan to purchase coal from mines to be located in the Northern Great Plains. A very large number buy power and energy at wholesale from suppliers proposing to purchase coal produced in that area.

The concerns of the members of NRECA are similar to those of the Mid-West and statewide organizations' members. Almost all of the rural electric cooperatives in Wyoming and surrounding States are members of NRECA. There are also a few members in other states which generate their own power and are dependent upon coal from the Northern Great Plains Area. There are a very large number of NRECA members who buy their electric power and energy requirements from other suppliers which are to a substantial extent dependent upon such coal.

The Environmental Impact Statement for the Eastern Powder River Coal Basin considered the mining plans of four mines, the approval of which was held up by the injunction. Since the stay of the injunction the mining plans for these four mines have been approved

by the Secretary of the Interior. There is also pending before the Department of Interior the mining plans for five additional mines. A draft environmental impact statement for one of these additional mines has now been issued. It is planned that draft environmental impact statements for the remaining four mines will be issued shortly. The application for an extension of an existing mine also had been approved by the Secretary of the Interior. The companies submitting the mining plans referred to in this paragraph were Amax Coal Company, Atlantic Richfield Company, Carter Oil Company, Ker-McGee Corporation, Peabody Coal Company, Sun Oil Company and Wyodak Resources Development Corporation. The development of all these plans had been stopped by the injunction and would be jeopardized were the lower court's opinion to be affirmed.

Coal from the Belle Ayr South Coal Mine of Amax Coal Company is sold to: Interstate Power Company, Iowa Power & Light Company, Kansas Power and Light Company, Public Service Company of Colorado and South Western Electric Power Company.

Coal from Atlantic Richfield mines is sold to: Oklahoma Gas and Electric Company and South Western Public Service Company.

Coal from the Carter Oil Company mines is sold to: Indiana and Michigan Electric Company.

Coal from the Kerr McGee Corporation mines is sold to: Arkansas Power and Light Company, Arkansas and Missouri Power and Light Company, Central Louisiana Electric Company, Inc., Gulf States Utilities Company, Louisiana Power and Light Company, Mississippi Power and Light Company and New Orleans Public Services, Inc.

Coal from the Wyodak Resources Development Company mines is sold to: Black Hills Power and Light Company.

All of the electric utility companies listed above sell electric power to members of NRECA and most of them also sell electric power to members of APPA. In addition, Dairyland Power Cooperative, a member of NRECA, buys coal from the Belle Ayr South Coal Mine of Amax Coal Company and Nebraska Public Power District, a member of APPA, buys coal from Atlantic Richfield mines.

NRECA's members operate in sparsely settled areas. The average consumer density of all the rural electric systems in the country is 3.9 consumers per mile of distribution line. This contrast with an average consumer density of 35 consumers per mile experienced by the Class A & B electric utilities in the nation. The average consumer density of the NRECA members in Wyoming and nearby states is even much lower than is the national average. Those densities are as follows: Colorado 3.0; Idaho 2.9; Kansas 1.8; Montana 1.7; Nebraska 1.8; North Dakota 1.3; South Dakota 15; Utah 2.7 and Wyoming 1.7.

More than half of the total operations and maintenance expense of the rural electric systems is represented by the wholesale cost of power and energy. Thus the impact on the small systems, serving low consumer density areas with the resultant very large investment in facilities per consumer, would be tremendous if the low cost western coal is not made available to them.

Examples of the extremely serious problems which would be created for NRECA members which generate their own power are the situations which would be

faced by Cajun Electric Power Cooperative, Inc. and Dairyland Power Cooperative if the decision of the lower court is not reversed. The impact on Cajun is discussed in the brief *amici curiae* filed by Western Fuels Association, Inc., et al. in this proceeding.

Dairyland Power Cooperative is a large generating and transmission cooperative with headquarters at La Crosse, Wisconsin. The coal requirements of its Alma 6 generating unit are to be supplied by Amax Coal Company. If the latter is not permitted to supply coal to Dairyland's Alma 6 generating unit, Dairyland might possibly be able to install scrubbers and use midwest coal of higher sulphur content. The cost of the scrubbers would be $3.3 million per year and the additional cost of coal would be approximately $2,250,000 per year. There is no capacity in the power pool in which Dairyland is a participant from which Dairyland could purchase power to be used in lieu of the power proposed to be generated at Alma 6. Other companies in the pool are also depending upon the Wyoming coal. If Dairyland were forced to rely on purchases of power from other members of the pool after 1978, it would appear that Dairyland's members would be subjected to power outages.

Dairyland possibly could install oil-fired generation. However, in view of the oil supply shortage it would not appear to be a wise choice. The oil requirement would be approximately 115 million gallons. The added fuel cost would be approximately $24.5 million per year.

It also should be pointed out that Dairyland does not at this time have any generatig plants scheduled for retirement, nor does it have any retired plants

which could be reactivated. The construction of a nuclear plant would require a lead time of at least ten years. In short, Dairyland's Alma 6 plant, from any practical viewpoint, is entirely dependent upon western coal.

Northwestern Public Power Association is a regional association, the members of which are municipalities, public utility districts, and rural electric cooperatives, similar to Mid-West. Certain of its members are also dependent upon the availability of coal from the Northern Great Plains.

II. ARGUMENT

The *Amici* fully support the arguments presented by the Federal Petitioners and the Intervenor Petitioners in the briefs they have presented to the Court demonstrating that the decision of the Court of Appeals should be reversed. Basically, that court erred in not affirming the judgment of the District Court that a regional environmental impact statement was not required by the National Environmental Policy Act because there was no existing or proposed regional federal program for the development of coal in the area designated as a region in the complaint. The district court's finding as to the lack of an existing or proposed regional federal program in such area was questioned by no one.

Reversal is also mandated by *Aberdeen & Rockfish R. Co.* v. *Students Challenging Regulatory Agency Procedures,* (SCRAP II) 422 U.S. 289, 320 (1975).

We shall not burden the Court with a repetition of any of the argument developed in the Petitioners' briefs which we support. We shall briefly describe

the critical importance to the entire electric utility industry, including the small, non-profit, consumer-owned utilities which are members of the *Amici,* of the early extensive development of new sources of low-sulphur western coal.

Although the recent slowdown in economic activity, the increased interest in the conservation of energy brought about by the Arab oil embargo and the consequent sky-rocketing of fuel cost caused a temporary decline in the rate of growth of the use of electricity, the demand for electricity in the United States will increase greatly in the next decade. With that increase the demand for coal must also rise sharply. Without a rapid increase in the supply of coal the electrical needs of the nation cannot be met, and the declared goal of national self-sufficiency in energy will become an impossible dream.

Coal is already the major fuel used in the production of electricity. According to the Review of Overall Reliability and Adequacy of the North American Bulk Power System, Fifth Annual Review, 1975, Appendix B, published by the National Electric Reliability Council, coal fired capacity represented 45.4 per cent of the electric generating capacity in the contiguous United States in 1975. Coal's nearest competition was oil which accounted for only 18.9 per cent of such capacity. Thus even at current levels of electric production an abundant supply of coal is critical to the electric utility industry.

Several factors are combining to enhance coal's crucial position in the near term future. One, of course, the increasing demand for electricity. The Bureau of Mines, U. S. Department of the Interior, in its publi-

cation "United States Energy Through the Year 2000", predicts a doubling of the BTU's of electricity generated by 1985 (from 19,635 trillion BTU's in 1974 to 39,090 trillion in 1985). A similar increase was predicted in the National Electric Reliabiilty Council's study, quoted from above, which forecast an increase from 1998 billion kilowatt hours of electricity generated in 1975 to 3595 billion in 1984.

Another factor is the increasing expense and scarcity of other fossil fuels. In response to the increasing expense and danger to national security of reliance on imported oil, the Federal Government has declared the goal of national energy self-sufficiency. An integral part of this policy is the recognition of the importance of coal. The affidavits of both Kent Frizzell, Acting Secretary of the Interior, and Frank G. Zarb, Administrator, Federal Energy Administration, attached to the Application to Dissolve Injunction[2] submitted to the United States Court of Appeals for the District of Columbia Circuit in this case, exemplify this recognition. Both indicate that self-sufficiency requires a doubling of coal production in the next ten years. (Frizzell Affidavit, p. 2 and Zarb Affidavit, p. 3). Seventy per cent of this coal must come from mines not now in existence, thus 250 new mines averaging three million tons of coal per year must be opened by 1985 (Frizzel Affidavit, p. 2); or put another way, we must open a million and one half ton mine each week for the next ten years (Zarb Affidavit, p. 3).

These predictions of the need for coal are in line with the estimates of the National Electric Reliability Council's "Estimated Fossil Fuel Requirements, Projected

[2] Attached as appendices to Federal Petitioner's Brief.

Generating Capacity, and Electric Energy Production for the Electric Utility Industry (Contiguous U.S.) 1975-1984" (July, 1975), which show that for electrical generation alone the demand for coal will rise from 419.6 million tons in 1975 to 780.8 million tons in 1984. Also, Federal Energy Agency's "Project Independence Report" (November, 1974) shows that 365 new coal fired electric generating facilities of a typical size of 800 MW, must be built by 1985 under the Base Case for energy independence. (Report, p. 70).

This heavy emphasis on coal in the effort to achieve self-sufficiency is natural since the United States contains 53 per cent of the free world's supply of coal, and since coal represents 94 per cent of the identified primary energy reserves in the United States.

Natural gas and oil cannot provide the increased fuel supply needed to satisfy the demand for electricity. The shortage of natural gas has already made itself felt in a decline in the amount of natural gas used in electrical generation. Federal Power Commission News Releases No. 21089 (February 3, 1975) and No. 22152 (February 17, 1976) show that gas purchased by electric plants declined from 3,209,365.4 thousand M.C.F. for the twelve months ending October 31, 1974 to 2,942,267.4 thousand M.C.F. for the twelve month period ending October 31, 1975. Predictions for the future use of gas in the production of electricity uniformly predict a continuation of this decline. The National Electric Reliability Council Estimates indicate a drop-off from 2,721.6 million M.C.F. in 1975 to 1,614.5 million M.C.F. in 1984. The Bureau of Mines study shows natural gas input into electrical production falling from 3,328 trillion BTU's in 1974 to 1,500 trillion BTU's in 1985 (U.S. Energy p. 28).

Oil usage in the electric utility industry in not expected to decline in the next ten years, but it is not expected to be able to meet the increased need either. The Bureau of Mines estimates that while coal will account for approximately 19,000 trillion more BTU's of electric generation in 1985 than in 1974, oil will only account for an extra 2,800 (*id.*). The National Electric Reliability Council estimates show oil usage increasing by only approximately one third between 1975 and 1984 while total generation almost doubles.

The limited future for oil and gas in the electric generating industry is confirmed by the National Electric Reliability Council's "Review" which indicates that "no new major gas-fired units are to be built after 1977, and commitments to new major oil-fired units decreased throughout the period [1975-1984]." (Review, p. 4). This is in line with the government's policy of discouraging the use of oil and gas in power plants and encouraging the use of coal. The Federal Energy Administration has already ordered 25 utilities and 74 power plants to convert to coal; FEA has also told 41 companies, affecting 74 more plants in 23 states, that new plants must have coal burning capability. (Zarb Affidavit, p. 3).

The above estimates of the increased need for coal are all based on the assumption that nuclear power will also expand rapidly in the next decade. The National Electric Reliability Council's Review counts on a fivefold increase in nuclear generated kilowatt hours between 1975 and 1984 (Review, Appendix C). The Bureau of Mines' prediction is an even more optimistic tenfold increase between 1974 and 1985. (U.S. Energy, p. 28).

The Project Independence Report is far from sanguine over the short term prospects for nuclear power. It cites several potential pitfalls:

> "To achieve even the low estimates of nuclear growth would necessitate a reversal of recent trends in the ability of utilities to raise investment funds and in equipment delivery and construction schedules, as well as a reduction of licensing delays. Achievement of higher levels of nuclear power could require a national commitment of manpower and other resources. The long lead time required to achieve nuclear capacity additions severely limits the possibility of increasing the number of nuclear plants which could become operational before the early 1980's." (Report, p. 115).

Even more doubt about the increased reliance on nuclear energy as a short term answer to energy independence is expressed in "The Coal Future: Economic and Technological Analysis of Initiatives and Innovations to Secure Fuel Supply Independence" written by Michael Reiber, Shao Lee Soo, and James Stukel of the University of Illinois, sponsored by Systems Integration and Analysis, National Science Foundation (May 1975). One finding of this study is that the Atomic Energy Commission under-estimated the price of nuclear power.

> "AEC estimates for 1980 are slightly over 15 mills/kwhe. However, using AEC data and a methodology derived from AEC publications, it is found that the costs to a utility in 1980 will be at least 22 mills/kwhe. At the bus-bar the price is likely to be over 32 mills/kwhe." (p. I-8).

An additional point made which both indicates that nuclear costs will be higher than expected and that

less nuclear power will be available is that AEC used in its cost comparisons a load factor (the level of production achieved) of 80 per cent, while the historical load factor has been 65 per cent or less (p. II-3). The study concludes that since more coal will be used the higher the price of nuclear power rises, and that since coal will fill in the gap caused by lower than expected levels of nuclear power production, coal use will, therefore, exceed expectations "unless increased dependence on foreign oil or a major recession are postulated." (p. I-8).

With the ever increasing amounts of coal being used to produce electricity, it becomes all the more important that low sulphur coal be burned. In this context Western coal becomes very important. According to the Project Independence Report most of the country's reserves of low sulphur coal are to be found in the West. (p. 103). The report shows that Northern Appalachian reserves are 66.1 billion tons. The mean sulphur content (per cent of weight) of this coal is 2.0 which greatly exceeds the per cent of sulphur of that coal required to meet SO_2 new source performance standards, 0.72. For Southern Appalachia the reserves are 38.9 billion tons with a mean sulphur content of 1.0 per cent, also over the 0.72 per cent mark needed; and Midwestern reserves are 104.5 billion tons with a mean sulphur content of 3.1 per cent, also well over the required sulphur mark for that coal of 0.66 per cent. On the other hand, there are 175.4 billion tons of Great Plains reserves with a mean sulphur content of 0.5 per cent, which meets the relevant sulphur requirement of 0.51 per cent. The per cent of sulphur which is required to meet the SO_2 standards varies because the heat content of the coal varies. (Report, p. 104). These figures clearly show the importance of Western coal.

The low sulphur content of Western coal has made it highly attractive to utilities. The National Electric Reliability Council's Review shows that "utilities in six of the nine reliability regions [which cover the entire continguous United States] are making major commitments for the use of abundant low-sulphur Western coal." (p. 5).

"Exploring Energy Choices, A Preliminary Report" of the Energy Policy Project of the Ford Foundation (1974) agrees that "most Western coal has a low sulphur content and therefore appears attractive for meeting air quality standards, even for use in Midwestern and Eastern power plants." (p. 24).

Since this coal is produced through surface mining a problem of reclamation results. However, the study continues:

> "An EPP-sponsored study by the National Academy of Sciences points out that in many parts of the West where rainfall is less than ten inches annually and where soils cannot retain moisture, reclamation is not feasible. The study concludes that if the best available technologies were applied, stable revegetation could likely be established in certain areas which are favored with good soil and adequate rainfall. Favorable conditions appear to exist in the mixed grass region of the Northern Great Plains." (p. 24-25).

In addition to the fact that it contains relatively little sulphur, Western coal fulfills another requirement of the growing electric industry. Due to economies of scale the growth in the electric industry is

concentrated in large new power plants. These new plants are often 800 MW, 1,000 MW, or even 1,500 MW. These plants require enormous amounts of coal. A 1,000 MW plant uses approximately 2,500,000 tons of Eastern or 3,000,000 tons of Western coal annually. At the present time, in order to secure the necessary financing the builder must be able to demonstrate a guaranteed source of coal for the life of the plant, typically 30 years. The only practical way to do this is to contract with a coal company to provide the coal for the life of the plant. To make such a contract the coal company must have the necessary 90,000,000 tons in the ground. There are very few such areas in the East. Thus coal for most new coal fired plants will have to come from the West.

Since Northern Great Plains coal is recoverable by surface mining techniques, it can be mined much more efficiently. The advantages are not just in cost, but also in the percentage of the deposit which can be mined. In surface mining operations 90 per cent of the coal can be removed by conventional methods, but only about 50 per cent can be removed by current underground techniques. (Project Independence Report, p. 103).

All these factors demonstrate the urgent need for the development of our coal resources, and in particular Northern Great Plains coal. Another factor must be mentioned, that of time. We must proceed quickly or our energy demand will outstrip our capacity to provide it. It takes three years to start up a large surface coal mine and five years for an underground one. (Zarb Affidavit, p. 4). The lead time necessary for a large coal-fired power plant is five years (Report, p. 69). In addition, large amounts of capital

must be gathered, the coal industry will need $15.4 billion in the next 10 years. (Zarb Affidavit, p. 4). While everything takes time, very little can be done until the source of coal is guaranteed. Should this Court affirm the judgment below and impose an injunction affecting the development of Northern Great Plains coal, the resulting delay in development of such coal could be several years. Preventing the use of Northern Great Plains coal, with its unique combination of abundance, low sulphur content, accessibility, and compatibility with reclamation can only have a devastating effect on the electric industry and the national goal of energy self-sufficiency.

Each of the *Amici* fully supports an aggressive, effective environmental protection program. Certain of their members have taken the lead in cooperating with environmentalists in developing effective programs to harmonize strip mining and electric power generation with sound standards of environmental protection.

The *Amici* agree that the Interior Department has the responsibility in passing upon proposed mining plans to insist upon the most effective practical environmental protection measures. They believe that the Interior Department is doing this. They agree that Interior should prepare site-specific environmental impact statements and, where appropriate, broader impact statements such as the Eastern Power River Coal Basin Impact Statement.

However, the Court of Appeals, in attempting to force the government to engage in regional planning of an area determined not by the government but by the respondents, has opened the door to a dangerous situation. Under the opinion of the Court of Appeals,

anyone with an interest in a vaguely-defined area of the country could bring a halt to unrelated governmental activities, merely on the basis of geographical location within a self-defined province, until a provincial environmental impact statement has been issued and its adequacy judicially determined. This could be accomplished without bothering to challenge the adequacy of impact statements covering related regions within the area. Just as many members of the *Amici* were hindered in their efforts to obtain necessary fuel and energy by the injunction, so too may every member, wherever located, be injured in the future by similar challenges.

What makes these future roadblocks so difficult to foresee, and thus plan for, is their arbitrary nature. The requirement of impact statements for inter-related projects can be understood, and therefore taken into account during planning. That requirement is reasonable and causes no problems for the *Amici.* Indeed they encourage such environmental planning. However, no amount of foresight could have predicted the need for a provincial impact statement for the Northern Great Plains, especially in view of the Proposed Federal Coal Leasing Program and Eastern Powder River Basin Impact Statements. Decisions on sources of fuel and energy must be made years in advance in order to insure their availability. In allowing private individuals to determine the boundaries for provincial impact statements the court below has introduced a wild card into the deck which could appear at any time, without warning, to prevent these publicly and consumer-owned utilities, as well as investor-owned utilities, from providing electric power to the people they serve. It must not be overlooked that the parties who will suffer the greatest harm if the judgment of the

Court of Appeals is allowed to stand are the millions of ultimate electric consumers in the nation: residential, farm, commercial and industrial.

III. CONCLUSION

For the foregoing reasons and those presented in the briefs of the Federal and Intervening Petitioners, and other *amici* the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Date: February 26, 1976